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In The
Supreme Court of the United States
October Term, 1984

RONNIE NORRIS DEWBERRY,

Petitioner,

v.

STATE OF CALIFORNIA

Respondent.

ON APPEAL FROM THE SUPREME
COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

#1 In a consolidated trial were PETITIONER'S constitutional rights to due process violated when the Court allowed the prosecution to question his CO-DEFENDANT concerning said CO-DEFENDANT'S post-arrest silence?

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APPENDIX

A. Opinion of the California Court of Appeals.

B. 5th Amendment to the Constitution of the United States.

C. 14th Amendment to the Constitution of the United States.

D. Article I, §7(a) of the Constitution of the State of California.

E. Article 3, §1 of the Constitution of the State of California.

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

RONNIE NORRIS DEWBERRY

V.

STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT

OF

THE CALIFORNIA COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals entered in the above-entitled case on December 12, 1984.

OPINIONS BELOW

On April 23, 1981, PETITIONER and his CO-DEFENDANTS were tried and convicted by the State of California for the 1st degree murder of Maurice Williams. The

trial court denied PETITIONER'S motion for severance and he was tried, along with his CO-DEFENDANTS in a consolidated trial. Each CO-DEFENDANT appealed separately from their convictions. The California Court of Appeals reversed the convictions of PETITIONER'S CODEFENDANTS but failed to reverse his own. PETITIONER filed a timely petition for rehearing but the California Court of Appeals denied it. The opinion of the California Court of Appeals is unreported but appears in Appendix A attached hereto.

JURISDICTION

The judgment of the Superior Court of the State of California for the County of Alameda was entered on September 11, 1981. The opinion of the Court of Appeals for the State of California subsequently upheld PETITIONER'S conviction. On December 12, 1984, the Court of Appeals denied PETITIONER'S motion for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3).

QUESTION PRESENTED

#1 In a consolidated trial were PETITIONER'S constitutional rights to due process violated when the Court allowed the prosecution to question his CO-DEFENDANT concerning said CO-DEFENDANT'S post-arrest silence?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent sections of the Fifth and Fourteenth Amendments to the Constitution of the United States; Article 1, §7(a) and Article 3, §1 of the Constitution of the State of California appears in Appendix B, C, D, and E attached hereto.

STATEMENT OF THE CASE

On April 21, 1981, the State of California tried PETITIONER and his CO-DEFENDANTS for a conspiracy to murder,

and for the actual murder of MAURICE WILLIAMS. The Court denied PETITIONER'S motion for severance and tried all defendants in a consolidated trial.

The Superior Court found PETITIONER and both of his CO-DEFENDANTS guilty of 1st degree murder. All CO-DEFENDANTS separately appealed their convictions in the Court of Appeals, which reversed PETITIONER'S CO-DEFENDANTS' convictions but affirmed PETITIONER'S conviction.

The California Appellate Court conceded in its opinion that ". . . this case involved a credibility battle between the defense and the prosecution witnesses, . . ." CD 23 1/ It, nevertheless, erroneously concluded that any error which may have occurred was harmless since there was other evidence upon which the jury

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1/ "CD" refers to Court of Appeals Decision.

could have based PETITIONER'S conviction. At first glance, there seems to be nothing wrong with this basic legal concept. However, a more in depth analysis of the witnesses' testimony reveals that fundamental errors were committed by the Court. These errors stripped PETITIONER of his basic constitutional rights to due process of law.

Both the PETITIONER and the prosecution produced witnesses who gave contradictory testimony as to PETITIONER'S whereabouts during and immediately after Mr. Wiliams was fatally wounded. The prosecution's witnesses testified that they heard PETITIONER outside the victim's front door during the shooting. CD 5. Another prosecution witness testified that he saw PETITIONER walking away from the scene of the crime with another CO-DEFENDANT and they both were driven away. CD 5. There were other prosecution

witnesses whose testimony was contradictory to that of the above. CD 7, 8, 9, 10, 11.

However, defendant produced a witness who testified that he saw PETITIONER coming out of a liquor store immediately after hearing the second shot. He further testified that Appellant was not out of breath nor did he look like he was running. CD 14.

Although the above testimony in itself is clearly contradictory and provides a fundamental basis for reasonable doubt, there is also the testimony of another witness. PETITIONER'S CO-DEFENDANT testified that he was alone when the shooting occurred and PETITIONER was not with him. During cross-examination the prosecution questionetd the CO-DEFENDANT as to why he did not tell the police, after he surrendered, that PETITIONER was not with him when the victim was shot. Specifically, the following discussion

occurred between Curtis and Lovett:

"MR. CURTIS: Q. You said you surrendered yourself because you didn't want Ronnie to stay in jail for something that you did:

A. Yeah.

Q. Well, did you go and start telling people your version of what happened on December 8, when you surrendered yourself:

A. No, I didn't.

MR. WAGNER: I would object to that.

MS. REST: I'm going to object.

THE COURT: Overruled.

MR. CURTIS: Q. Did you make any effort to get Ronnie out of jail once you surrendered yourself?

A. To get him out?

Q. Yes, did you go and do something and try and get him out once you surrendered yourself?

A. Like what?

Q. Did you do -- you said you surrendered yourself because you wanted -- didn't want Ronnie Dewberry ride the beef; Is that right?

A. Yes.

Q. When you surrendered yourself, what, if anything, did you do in order to explain to anybody that Ronnie Dewberry was not involved with the murder of Maurice Williams?

A. I got up her (indicating.)

Q. So you waited until this whole trial after all the witnesses for the prosecution had testified before you took the stand to say what happened on December 8, 1980?

A. Well, I didn't feel if I told you, you would try to help me or anything like that.

Q. You didn't think the police would have helped you that night?

A. No, I didn't.

Q. And you didn't think the prosecution would believe you because you knew the prosecution had too much other evidence, didn't you?

A. No, I didn't--

MR. WAGNER: Oh, I'm going to object to that.

THE COURT: Wait a minute. Wait a minute, sustained. . . CD 19,20.

The foregoing testimony blatantly indicates the prosecution's improper questioning concerning PETITIONER'S CO-DEFENDANT'S post-arrest silence. Defense counsel immediately moved for a mistrial on the ground that the prosecution's improper questioning violated DEFENDANT'S rights to due process guaranteed by the Fifth and Fourteenth Amendment of the Constitution of the United States. Said motion was denied with all objections presumed. CD 20.

REASONS FOR GRANTING THE WRIT

PETITIONER argues that the prosecution's questioning concerning his CO-DEFENDANT'S post-arrest silence violated PETITIONER'S right to due process of law under the Constitution of the United States of America.

This Court has meticulously addressed the issue of the right of the accused

to protect himself against self-incrimination. In the leading case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) 16 L.Ed 2d 694, this Court held,

> . . .We hold that when an individual is taken into custody or otherwise deprived of freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other full effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and if he cannot afford one an attorney will be appointed for him prior to questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity offered him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution

> at trial, no evidence obtained as a result of interrogation can be used against him.

384 U.S. 436 at 478, 479. (emphasis added).

In Miranda, the court reasoned,

> [t]he warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system --that he is not in the presence of persons acting solely in his interest. Id. at 469.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976), 49 L.Ed.2d 91, this Court held, "that the use for impeachment purposes of PETITIONER'S silence at the time of arrest and after receiving Miranda warnings violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. 610 at 619. Although Doyle discussed the

situation occurring after an arrested person was given Miranda warnings, it is submitted, that the same principle of law applies even if that person was not informed of his Miranda rights.

The rights contained in the Miranda warnings are not initiated when the arresting officer says the magic words. There is nothing magical about these rights. These rights, in fact, are derived from the Constitution of the United States of America and are automatically bestowed on every United States citizen. Furthermore, because of the prominence of television and other mass media forms, most citizens know, without being further advised by the arresting officer, that they have the right to silence and that anything they say might be used against them in a court of law. This does not mean that an arresting officer should no longer be required to inform the arrested person of

his Miranda rights. It does mean, however, that even if the arresting officer fails in his duty to read Miranda warnings, and the person, nevertheless, elects to remain silent, he still has the right not to have his slience used against him. This concept is embedded throughout the Miranda decision, supra.

The United States Court of Appeals, First Circuit, has ruled on the question of whether an arrested person can invoke his constitutional right to silence and not have his post-arrest silence used against him in a court of law. In Fagundes v. United States, 340 F.2d 673 (First Cir. 1965), that court held,

> . . .we think it reversible error to permit evidence of refusal to talk and of request for counsel to be used for the purpose of impeachment. In the first place such evidence is ambiguous. Fagundes' words when read can as well be taken as indicating reliance upon constitutional rights as supporting an infe.ence that his alibi was an afterthought. There

> is nothing to indicate which interpretation is more probable. Cf. Grunewald v. United States, 353 U.S. 391, 415-524, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). In the second place we think it reversible error to permit a jury to draw any inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel. Id. at 677.

In Fagundes, when Plaintiff was arrested, the officer asked him if he wanted to make a statement regarding the incident. The Plaintiff replied "that he did not want to say anything but wanted to see a lawyer." Id. at 676.

In Fagundes, the court reasoned:

> Thus when Fagundes said when he was arrested and handcuffed that he wanted to see a lawyer he was exercising a federal constitutional right. And certainly at that juncture he had the constitutional right to keep silent. His assertion of one's constitutional right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would be to render the constitutional rights mere empty formalities devoid of practical substance. Id. at 677. (emphasis added) (citation omitted).

Miranda, Doyle and Fagundes provide the legal principles which are fundamental to PETITIONER'S case. They hold that the right to remain silent, and not to have that silence held against the accused in a court of law does not depend on the arresting officer's conscientiousness, but rather stems from an automatic right deeply ingrained in the Constitution.

The California Court of Appeals correctly stated,

> [R]espondent claims that (PETITONER'S CO-DEFENDANT'S) testimony that he surrendered himself to exonerate (PETITIONER) cannot be reconciled with his post-arrest silence. We disagree. A person (PETITIONER'S CO-DEFENDANT'S) circumstances, i.e., surrendering to the police, would probably be advised by counsel to exercise his Fifth Amendment right to silence and wait until trial to present his version of the facts. (PETITIONER'S CO-DEFENDANT'S) post-arrest silence may have been an invocation of his constitutional right to remain silent and it was a Doyle error for the prosecutor to question him concerning that silence. CD 21.

The California Court of Appeals then departed from their logical reasoning and held, this error does not, however, require a reversal of (PETITIONER'S) conviction because it was harmless beyond a reasonable doubt. The Court said:

> (PETITIONER'S CO-DEFENDANT'S) testimony that (PETITIONER) was not present at the time of the shooting corroborated McIntyre's testimony that (PETITIONER) was at the liquor store moments after the shooting. The questions directed at (PETITIONER'S CO-DEFENDANT) about his failure to immediately upon surrender tell the police of (PETITIONER'S) innocence were not of such a nature as to have caused the jury to reject (defense witness's) and (PETITIONER'S CO-DEFENDANT'S) alibi for (PETITIONER). The jury simply gave greater credence to the [prosecution's witnesses than it did to those for the defense.] CD:22.

Although this would usually be considered sound reasoning and a valid legal principle, in this case, however, the court completely ignored the extremely prejudicial effect that the prosecutors repeated questioning concerning the post-arrest

silence of PETITIONER'S CO-DEFENDANT had on the jury. It is submitted that because of the conflicting testimony of all the witnesses and the testimony of PETITIONER'S CO-DEFENDANT exonerating PETITIONER, it is impossible to conclude that the jury decision was not substantially influenced by the prosecutor's improper questioning regarding PETITIONER'S CO-DEFENDANT'S post-arrest silence. This prejudicial error warrants reversal. [Kotteakos v. U.S., 329 U.S. 750 (1946); Fiswick v. U.S., 329 U.S. 211 (1946); Grunewald v. U.S., 353 U.S. 391 (1957); Griffin v. State of California, 380 U.S. 609, 14 L.Ed.2d 106, Alexander v. U.S., (5th Cir.) 354 F.2d 59 (1965); S.Ct. 1229, reh den. 381 U.S. 957, 14 L.Ed.2d 730, 85 S.Ct. 1797, (1965); Helton v. U.S., (5th Cir.) 301 F.2d 338 (1955); Wright v. U.S. (10th Cir.) 301 F.2d 412 (1962), U.S. v. Wells (6th Cir.) 431 F.2d 432 (1970), cert. den. 91 S.Ct.

380 (1970); Johnson v. Patterson (10th Cir. 1970) 475 F.2d 1206; Reid v. Riddle, (4th Cir.) 550 F.2d 1003 (1977); People v. Merkouris, 46 C.2d 540, 297 P.2d 999 (1956); People v. Dorado, 62 C.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1965); People v. Galloway, 100 C.A.3d 178, 170 Cal.Rptr. 461 (1980); People v. Redmond, 29 Cal.3d 904, 176 Cal.Rptr. 780, 633 P.2d 976 (1981), People v. Fabert, 127 C.A.3d 604; 179 Cal.Rptr. 702 (1982)].

Respondent contends that it was proper for the prosecutor to question PETITIONER'S CO-DEFENDANT concerning his post-arrest silence on the grounds that the questioning was conducted for impeachment purposes. This is a completely erroneous understanding of the law. It is correct that a prior inconsistent statement can be used to impeach a witness's testimony when said statement is inconsistent with or contradictory to his testimony.

"A prior statement of a witness to be provable for impeachment must be substantially contradictory to or inconsistent with, his testimony..." 98 C.J.S. 558. However, before this basic rule can become operable the witness must have uttered a prior statement inconsistent with his present testimony. This bears no resemblance to what happened in this case. Here, the witness made no prior statements whatsoever. When he was interrogated, he immediately invoked his constitutional rights to remain silent. The prosecutor has attempted to substitute his silence for a non-existing prior inconsistent statement. The prosecutor asserts that the witness's silence is inconsistent with his desire to exculpate PETITIONER.

It is submitted that a witness's constitutional right to silence can never be equated with a prior inconsistent statement.

When a witness has made a prior inconsistent statement, he has forfeited his right to silence and thus allows himself to be cross-examined on that statement. Conversely, when a witness invokes his right to silence, he automatically invokes the right to bar the prosecutor from questioning him on that silence. This automatic protection is the heart of a witness's right to silence.

The Courts have held that a witness cannot be questioned regarding his post-arrest silence. In U.S. v. Nolan, 416 F.2d 588 (10th Cir. 1969), the court said:

> [i]n a trial in a federal court it is reversible error for counsel for the United States or the trial judge to comment on the failure of the defendant to take the stand and testify in his own behalf. The defendant has the constitutional right to remain silent.
>
> Such comment, if permitted, would impose a penalty on the exercise of the constitutional privilege. It would greatly impair that privilege and the exercise thereof would be costly to the

defendant. (Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229) Id. at 594. (emphasis added.)

In Fowle v. United states of America, 410 F.2d 48 (9th Cir. 1969), the court said: "Here, adoption of the Government's decision would likewise place Fowle on the horns of a dilemma, compelling him,. . . to choose between constitutional rights and suffer prejudice from the choice he has and exercises." Id. at 55.

In Fowle, the court held:

> "We will not invite or encourage the sophistry which would attend an interrogating procedure under which police would be required to warn an arrested person that if he avails himself of his constitutional right to remain silent, proof that he did so may be subsequently offered to discredit any testimony presented by him at trial." Id. at 56.

There are instances when the detrimental effect of having a witness erroneously questioned can be cured by a corrective instruction to the jury. However, it is a realistic view that when a jury

hears improper testimony or comments, it is most unlikely that it will actually forget them and not allow them to influence their decision.

In Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 76, 93 L.Ed.2d 790 (1948), Mr. Justice Jackson in a concurring opinion states: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . .all practicing lawyers know to be unmitigated fiction." 336 U.S. at 440, 453.

Furthermore, it is a basic rule of law that the error is not complained of might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963). The above legal principles have been upheld in: Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1229, 14 L.Ed.2d 106, (1964), Griffin v. California, 380 U.S. 609, 14

L.Ed.2d 106, 85 S.Ct. 1229 (1965); People v. Cockrell, 63 C.2d 659, 47 Cal.Rptr. 788, 408 P.2d 116 (1965); United States v. Sememshon, (2nd Cir.) 421 F.2d 1206 (1970); Johnson v. Patterson, (10th Cir.) 475 F.2d 1206 (1970); Reid v. Riddle, (4th Cir.) 550 F.2d 1003 (1977); Bruton v. U.S., 391 U.S. 123, 129, 88 S.Ct. 1620, 20 L.Ed. (1968).

In this case, when the police commenced interrogating PETITIONER'S CO-DEFENDANT, he immediately informed the police that he did not want to make a statement concerning the murder. By doing so, he immediately invoked his Fifth Amendment right to silence without the risk of having that silence used against him in a court of law. Moreover, the Court of Appeal conceded, ". . . this involved a credibility battle between the defense and prosecution witnesses,. . ." CD:23. The jury deliberated approximately twenty hours over a

five-day period. Jury deliberations of this length indicate that a case is close and that any error of substance, even an evidentiary error, is not harmless. [(e.g., People v. Cardenas, 31 Cal.3d 897, 907 (1982)]. Twelve hours of deliberations indicated that the issue of guilt was not open and shut and that admission of improper evidence was prejudicial. Considering these facts, it cannot be accurately said that there was no reasonable possibility that the prosecutors repeated questioning of PETITIONER'S CO-DEFENDANT'S post-arrest silence might not have contributed to the jurors decision to convict PETITIONER: Fahy v. Connecticut, 375 U.S. 85, 86, 87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963). It is therefore submitted that the Prosecutor's questioning of PETITIONER'S CO-DEFENDANT'S post-arrest silence constituted harmful error, which violated his constitutional right to due process of law. This harmful

error entitles PETITIONER to have his conviction reversed.

CONCLUSION

The PETITIONER'S right to due process of law was annihilated when the California Court allowed prosecuting testimony of PETITIONER'S CO-DEFENDANT'S post-arrest silence to be admitted as evidence. This prejudicial error allowed by the Court was so harmful that it could not be disregarded by the jury and, therefore, it affected the substantial rights of the PETITIONER guaranteed by the 5th and 14th Amendments of the Constitution of the United States of America. Therefore, he is entitled to a reversal of his conviction.

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Therefore, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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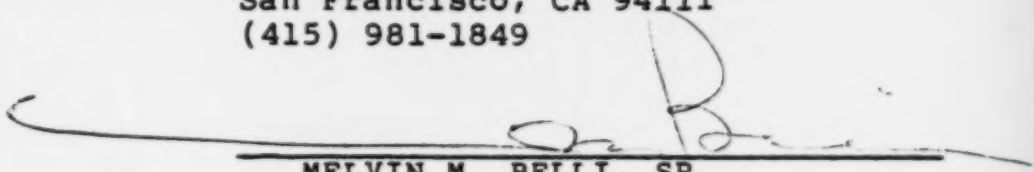

MELVIN M. BELLI, SR.

Attorney for Petitioner

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RONNIE NORRIS DEWBERRY, ALVIN JOE LOVETT, and MELINDA DARNELL DENTON aka LOVETTE,

Defendants and Appellants.

A011581

(Alameda Super. Ct. No. 71769)

Ronnie Norris Dewberry, Alvin Joe Lovett, and Melinda Darnell Denton separately appeal from judgments of conviction entered on jury verdicts finding them guilty of first degree murder (Pen. Code, §§ 187, 189) and of assault with a deadly weapon (Pen. Code, § 245, subd. (a)). The jury also returned findings that Lovett and Denton were armed with a firearm within the meaning of Penal Code section 12022, subdivision (a) on both counts charged. They further found that

Dewberry used a firearm within the meaning of Penal Code section 1203.06 and 12022.5, and that he intentionally inflicted great bodily injury within the meaning of Penal Code section 1203.075 in conjunction with the murder count.[1]

Facts

On December 8, 1980, Eddie Maurice Williams (Maurice) was shot. His death was caused by a bullet fired through the front door of his upstairs apartment at 2021 24th Avenue by someone standing outside. A metal fragment dislodged from the door by the bullet wounded Christopher (Chris) Williams, Maurice's brother. The prosecution's theory was that appellants tricked Maurice into opening the

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1. The Verdict of Jury returned reads "We, the jury, further find that during the commission and attempted commission of the offense charged in Count Two of the Information the defendant RONNIE NORRIS DEWBERRY, with the intent to inflict such injury, did not inflict Great Bodily Injury on Christopher Williams." (Emphasis added.) The judgment of the court entered on September 11, 1981,

front door, and then shot him for his failure to return to appellant Denton her children and money. Defendants claimed that Lovett accidentally shot Maurice while attempting to aid Denton who had gone to the apartment to get her two children.

Prosecution's Case

Melinda Denton arrived at 2021 24th Avenue around 3:30 p.m. on December 8, 1980. Her two small children were being babysat by Sandra Williams. Donna and Ollilean (Pookie) Williams and Florida Wesley (Florida) were sitting on the front steps leading to their apartment. As Denton walked up the stairs she had some money in her hand. Pookie either touched or grabbed Denton's money as she walked by, but Denton grabbed it back. Denton

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reads "The defendant having been convicted . . . as charged in Count Two of the Information, with a Use clause and a Great Bodily Injury clause." No sentence was imposed on the Great Bodily Injury clause on count two. This "error" was not repeated in the probation report.

had about $67 in bills.

Carmen Williams lived in apartment No. 4 with her three daughters (Donna, Pookie, and Sandra), her two sons (Maurice and Chris), Chris' girlfriend Florida, and their child Tamara. Denton entered the apartment and spoke briefly with Chris; then she discovered that her money was missing from her purse. She accused Pookie of stealing the money and an argument ensued. Irate, Denton threatened to call the police or to go get her boyfriend Lovett "because somebody had her money and she said that [Lovett] would get her money back somehow."

Denton went to the wash house where she told Lovett, his other girlfriend Andrea, and Dewberry that Pookie had stolen her money and that the Williams' refused to return her children to her. Denton, Lovett, and Andrea went to Andrea's apartment and got a rifle. Kevin Gilkey's blue Cadillac was seen going up 26th Avenue towards E. 20th with four or

five people in it. A blue Cadillac pulled up and parked near the apartment. About fifteen minutes after Denton had gone to get Lovett, Dewberry knocked on the door to the apartment and asked for Chris. He had a rifle and told Chris to have the people clear out of the apartment because "I fixing to shoot it up." Lovett was in the vacinity waiving a magnum handgun, jumping up and down. He hollered: "Everytime one of you mother fuckers walks out the door, you're all going to drop like flies."

Pookie, standing out on the front porch got into a loud argument with Lovett. A neighbor heard Pookie and Lovett swearing and threatening each other. Florida testified that Lovett "was saying he was going to kill him somebody if he didn't get his money. He was saying, 'send out your mommie, send out Pookie, anybody because nobody keeps my money. I'm going to get mine and I'm going to get mine if I have to kill . . . . '" Pookie

testified that Lovett shouted "if he don't get the money, I was going to be the first motherfucker to get shot down." Maurice ran outside with a shotgun and fired it into the air. Sandra ran after him. She subsequently saw Kevin Gilkey on the porch in back of the duplex.

Several witnesses saw Dewberry carrying a rifle walk past the apartment soon after the shot was fired. Willie McIntyre visiting his mother on E. 20th Street heard the shot and saw Lovett run by in a grey jogging suit. He saw Lovett talking with two women and heard Lovett say "I'm going to get him." He also saw Lovett speak with Dewberry.[2]

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2. McIntyre subsequently is not sure that he saw Lovett. James E. Kennison, an investigator for the district attorney's office, testified that McIntyre could only tell him that he saw Dewberry at the liquor store when the incident occurred. "He told me that he didn't remember anything else. He didn't want to make any more statements, that his family lived in that area, that he lived in that area, and he was concerned about their safety."

At 5:42 a.m. the police received from a Ms. Williams who reported that Alvin Lovett, a black male in a grey jogging suit threatened her with a shotgun and was in front of the apartment. Lovett was wearing a grey jogging suit that evening.

Back in the apartment Sandra took the shotgun from Maurice and put it in her bedroom. Within minutes there was a knock on the door. Denton told Maurice that she was by herself and that she wanted her kids. Maurice's mother told Maurice to "[o]pen the door and let her get her kids." Maurice opened the door. Denton either was pulled into or pushed her way into the apartment. On her way in Denton managed to turn the deadbolt latch so the front door could not close. Maurice, crouched by the front door, was attempting to push it closed with one hand while scuffling with Denton with the other. Six to twelve inches of a rifle barrel came through the crack in the door; it was pulled back. A shot,

or shots, rang out. Bleeding from his neck and hands Maurice said "God damn" and retreated to a back bedroom. Sandra turned off the lights, grabbed Denton, and "hit the floor." At 5:44 a.m. a call requesting an ambulance for a man wounded by a shotgun at 2021 24th Avenue was received by the Oakland police department. Florida heard Lovett say "I got me somebody and I got five more. We going to empty them all before the night is over with." Chris heard Dewberry say "I got something." Both heard the sound of two people running away. No one had heard anyone coming up the stairs although the vibrations of people walking on the staircase could usually be heard in the apartment.

Chris looked out the window in Pookie's room and saw Dewberry and Lovett running down the street. Dewberry was carrying a rifle. Florida heard Chris exclaim "there they go." Kenneth Parker, who lived a block away, heard the shot. He saw Dewberry, Lovett, and a

woman run across the parking lot in front of Williams' apartment building, climb into Kevin Gilkey's blue Cadillac and drive off. Denton left her children in the Williams' apartment after the shooting.

The police arrived at the apartment at about 5:55 p.m. They found a large amount of blood on the floor, metal fragments on the kitchen floor and a live shotgun shell outside the apartment. No other bullet holes were found in the apartment. A shotgun was found stuck between the mattress and box spring of the bed upon which the injured Maurice was lying. A sandal was found on the walkway outside the apartment. Chris testified that Denton had been wearing similar looking sandals.

Dewberry surrendered to the police about 45 minutes after the shooting. He volunteered to the police that "Maurice shot at me first."

Maurice died from two parallel wounds

that entered his throat, passed through his left carotid artery, his windpipe, esophagus, and left jugular vein down into his left chest cavity. The wounds appeared to be caused by metal fragments from the front door. He had wounds to both his hands which may have been caused by a small caliber bullet. His face, neck, chest and right arm and hand were covered with white flecks, probably paint from the front door. Chris had a metal fragment removed from his chest at Highland Hospital.

Florida testified that she was approached by Lovett on May 2, 1981. Lovett offered to give her $5000 and a pound of marijuana if she would change her testimony and inculpate Dewberry. Florida did not tell anyone about the bribe right away because she "didn't think nothing of it."

The Defendants' Case

Appellants exposed inconsistencies in the testimony of nearly every witness that

testified, and inconsistencies in versions of the same event given by different witnesses. Many of the prosecution witnesses were friends of Chris Williams.

For instance, Florida testified at the preliminary hearing that she did not see Lovett with a gun on the evening of the shooting. She heard one shot, and then heard Dewberry say "I got me somebody." "Here I got me somebody" and "There's five more in here and I'm gonna empty them before the night is over with." She testified that Chris could not find Maurice's shotgun after the shooting. She made no mention that Chris looked out the back bedroom window after the shooting and exclaimed "there they go."

At trial, after allegedly being offered a bribe by Lovett, Florida testified that she saw Lovett waiving a handgun and threatening to shoot the Williams. She heard two shots ring out, then heard Lovett say: "I got me somebody." Then she heard two people running

away. She saw Chris look out the window and heard him say "there they go." She saw Chris standing in the hall with the shotgun. (The shotgun had a type blood on the breech and barrel which could either be Chris' or Maurice's. If Chris did not have the shotgun, Maurice could have been armed with it when he was shot.) Florida is Chris' girlfriend and the mother of his child.

Florida also gave a statement to the police within hours of the shooting. She described the events preceding the shooting: "It was about 5:40 p.m. Rocks were being thrown at the house. The rocks stopped and Maurice said that he had to go to school and opened the front door." There was no mention of Denton knocking on the door before the gunshot. She heard someone say "yeah, nigger, I got five more in here and we're going to empty them all before the night's over," but she did not identify the voice in the police statement.

Chris testified at the preliminary hearing that there was a lot of hollering and yelling going on after the shooting. He was running after Maurice towards the back of the apartment when he heard a voice outside exclaim something to the effect "I got something." He did not hear Lovett's voice. He heard what seemed like four people running down the stairs. He looked for the shotgun after the shooting, but he couldn't find it. He did not hear Lovett make the statement Florida claimed Lovett made.

His testimony vacillated on how many shots were fired from two to three in the police statement, to one at the preliminary hearing, and back to two or three at trial. He testified to one at the preliminary hearing because "I figured out because then I looked up on the wall and there wasn't not bullets up there." He did, however, also state: "No. No. I don't know because, you see, it was that -- I guess if it was two shots came

through, you see, at first I had thought the bullet came through. One went straight through the door. One like, say our door was cracked a little bit. One went through there and one came straight through the door." At trial his final statement was that he heard "about one or two probably." He believed it might be two because "he [Maurice] was hit in too many places for it to really be one shot."

He gave a statement to the police at Highland Hospital right after he had the metal fragment removed from his chest. He gave this version of the shooting: "About five minutes later I saw [Dewberry] and [Lovett] out in front of my house, standing on the other side of a small white fence. [Dewberry] was pointing a shotgun in my direction and [Lovett] was pointing a handgun. . . . I saw a flame and heard a shooting off coming from Dewberry's shotgun. . . . I helped my brother off to the side." . . . "I heard several more shots, and saw [Dewberry] and

[Lovett] running down 24th Ave. toward E. 14th Ave." The officer spent an hour taking this statement, it was read back to Chris and signed. Chris could not remember if he told the officer that he looked out the bedroom window and saw Dewberry and Lovett running away after the shooting. He was bleeding from the chest when he went to the window in the back bedroom. The window was placed high on the wall, at Chris' throat level. He placed his hands against the wall and leaned his head out the window. Officer Sanchez looked for blood in that room, but found none.

Sandra, Pookie, and Chris all claimed to be right by Maurice at the front door when he was shot.

Sandra heard only one shot. She heard no footsteps before or after the shooting, nor did she hear any of the appellants make any statements. Her version of Denton's latching of the dead bolt at trial varied from the description she gave at the preliminary

hearing.

Pookie claimed to be next to Maurice at the time of the shooting, but she did not see Sandra in the vacinity. Denton knocked on the door and Pookie told Maurice to "[p]ull that bitch in for lying." Maurice grabbed Denton by her wig and pulled her in. She heard no footsteps after the shot, but she was in the back of the apartment by then. Pookie did not actually see Denton turn the latch, although she testified at the preliminary hearing that she had. She had been told by her sister Sandra that Denton turned the lock. She did, however, see the door bounce back open when Maurice tried to push it shut.

Chris testified that he, Maurice, and his mother were by the front door when Maurice opened it.

Paul Wesley, who saw Andrea give a rifle to Denton and Lovett before the shooting, is Florida's brother and close to Chris. Kenneth Parker, who saw Dewberry, Lovett and a

woman drive off in Gilkey's blue Cadillac after the shooting, is a good friend of Chris'.

There was agreement that the stairs to the apartments vibrated when people walked up them, and that people in the apartment generally heard people approaching. Annie Ratcliff, the downstairs neighbor, did not hear anyone walking up the stairs before the shooting, but she was hiding in the back bathroom with her children about the time of the shooting. There was testimony that tenants usually cannot hear people on the stairs when they are in the back of their apartments. There were ten people in the Williams' apartment at the time of the shooting, and a fair amount of yelling going on. Lovett testified that a lot of noise would block out the sound of someone on the stairs.

Lovett testified in his own defense. On December 8, 1980, he was down at the wash house with Andrea and Dewberry when Denton

showed up. Denton was very upset because the Williams' had taken her money and had refused to let her pick up her children. He claimed that "Pookie, she done jumped on [Denton] before and tooken different things from [Denton]," so he assumed it was true that Pookie had taken her money this time. Lovett was on good terms with most of the Williams family and felt that it would be easy to resolve the problem. They all walked up to the apartment together. Dewberry brought a rifle, although Lovett felt that that was unnecessary. On his way to the apartment Lovett stopped and talked to Gilkey, who was on foot, for a few minutes. Dewberry went on ahead. Pookie was standing out on the balcony when Lovett arrived at the apartment. Lovett told Pookie that Denton wanted her money and kids. Pookie in a loud voice said: "[Denton] ain't got no money and these kids are going to a foster home." Lovett retorted: "Fat-ass bitch, send them kids down." Their

argument escalated. Lovett said: "'Come on down the stairs' and she said 'you going to die,' and the next thing she said, 'Get him, Maurice.'" Maurice came running out with a shotgun. Maurice shot the gun twice. Lovett took off running, he did not know where Denton or Dewberry were. Lovett hid in one of the neighboring yards. He heard Denton asking someone at Ann Ratcliff's apartment if she could use the phone. They said they did not want to be involved and slammed the door.

He then saw Denton going up to the Williams' steps. She asked for her children, then a "hand came out and grabbed her." He could see that Denton had red high heels on. Denton and her children were screaming. "It sounded like they were beating her and stuff." Maurice had beaten Denton before and given her a black eye. Lovett ran toward the apartment building. He ran into Dewberry, "snatched the rifle from him" and said "come on, they got [Denton], but Dewberry didn't

come with him. He ran up the stairs and pushed up against the door with his shoulder. The door slammed closed on the rifle barrel. He jerked "really hard" on the gun, fell back against the bannister, and the gun went off. Scared, Lovett took off running, but he stopped on the bottom of the stairs and decided to go back and get Denton. Denton came running out, followed by Chris. Chris pointed the shotgun at her, but did not shoot.

Lovett took off running again. He dropped the rifle in a backyard. He saw Andrea and Gilkey. He told Gilkey to tell Denton where they were. He and Andrea went back to the motel where he and Denton had been staying. Lovett did not immediately call the police and explain the accident because he was afraid they would not believe him and he didn't want to go to jail. He did eventually surrender himself because "I really didn't want [Dewberry] to -- ride the beef to stay in here for something I did."

Rita Bell testified that Lovett was at her home on May 2, 1981, the day Lovett allegedly tried to bribe Florida. She testified that Lovett stood in her yard talking with her daughter from 8 a.m. till 10 p.m. Lovett testified that he did not try to bribe Florida and that he was at Rita Bell's on the day in question.

A neighbor testified that Denton asked to use her phone to check on her children before the shooting, but that she wouldn't let her in. Another neighbor living in the back duplex, remembers that Maurice once gave Denton a black eye. She also remembers "more than twice" having heard Denton threaten to have Maurice "put away." These statements were made in the context of Maurice refusing Denton's advances. On the day of the shooting this neighbor saw Gilkey's blue Cadillac parked in the driveway. It was not there when she saw Denton by the apartment door right before the shooting. The porchlight was

not on, but she saw Denton against the light shining through the kitchen window. She did not see a gun in her hand. She saw no one else with Denton. A few minutes later she heard two shots.

Willie McIntyre, a custodian at the Oakland City jail, testified that he was at his mother's house on E.20th Street on December 8, 1980. He knew Dewberry well. He heard a shot and saw Lovett running by in a grey jogging suit. He saw Kevin Gilkey sitting across the street and spoke with him. He saw Lovett talking to "some girls." He subsequently stated that he was not sure the person was Lovett. Later he saw this person talking to Dewberry.

McIntyre went back inside and heard a shot and some screaming. He left at once for the liquor store on 23rd Avenue. Less than a minute after the shot he ran into Dewberry. Dewberry did not have a gun, he was not out of breath, nor did it look like he had been

running. He was coming out of the liquor store. At about seven that night he went out with his father. He saw Dewberry at the poolhall and told him that the police were looking for him.

Dewberry surrendered to the police within an hour of the shooting. A gun shot residue test can be ordered on a suspect within six hours of a shooting. No such test was ordered for Dewberry, although such a test was done on the door. The officer testified that he did not usually test suspects for gun shot residue. Four other witnesses testified that Dewberry was a peaceful person.

I

Appellants initially challenge the aiding and abetting instructions delivered to the jury. The jury was instructed per CALJIC No. 3.00[3] and 3.01, as modified pursuant to

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3. CALJIC No. 3.00 provides in part: "One who aids and abets is not only guilty of the particular crime that to his knowledge his

People v. Yarber (1979) 90 Cal.App.3d 895, 912.[4]

In People v. Beeman (1984) 35 Cal.3d 547, the California Supreme Court held that for aiding and abetting liability there must be proof that the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (Id., at p. 560, emphasis in original.) thus, the court concluded that the only appropriate instruction on aiding and abetting liability is one which informs the jury that "a person aids and abets the commission of a

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confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged."

4. The modified version of CALJIC No. 3.01 provides: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he intentionally aids, promotes, encourages or instigates by act or advice the

crime when he or she acting with: (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense; (3) by act or advice, aids, promotes, encourages, or instigates, the commission of the crime." (Id., at p. 561.)

The instant instructions failed to meet this standard. With respect to the CALJIC No. 3.01 instruction, which was modified in accordance with People v. Yarber, the court in Beeman found that type of instruction inadequate because it is "sufficiently ambiguous to conceivably permit conviction upon a finding of an intentional act which aids, without necessarily requiring a finding

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commission of such crime. [§] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [§] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

of an intent to encourage or facilitate the criminal offense." (Ibid.) Also insufficient is CALJIC No. 3.00. (See People v. Caldwell (1984) 36 Cal.3d 210, 224.)

The remaining question is whether the instructional error requires reversal of the judgments of conviction.

The California Supreme Court has yet to determine what is the appropriate standard of review for Beeman error. (People v. Beeman, supra, 35 Cal.3d at p. 563.) In that case, the error was found reversible under the standard set forth in People v. Watson (1956) 46 Cal.2d 818, 836. (People v. Beeman, supra, at pp. 561-563.) In a subsequent case, the court found the error harmless where the defendant had presented a duress defense, commenting that the jury evidently rejected the defense version and events in which he acted without criminal intent. "Hence, the challenged instruction could not have affected the jury deliberation and verdict. (See

People v. Sedeno (1974) 10 Cal.3d 703. . . .)" (People v. Caldwell, supra, 36 Cal.3d at p. 224.) Thus, the high court has impliedly accepted a Sedeno analysis as an appropriate one for reviewing Beeman error.

Under the Sedeno analysis, the instructional error is reversible per se unless the reviewing court can determine that the factual question posed by the erroneous instruction was necessarily resolved adversely to the defendant under other properly given instructions. (See also People v. Wickersham (1982) 32 Cal.3d 307, 335; People v. Modesto (1963) 59 Cal.2d 722, 730.) Applying that test to appellant Dewberry we are satisfied that the instructional error does not require reversal. The jury found that he personally used a firearm and personally and intentionally inflicted great bodily injury on Maurice in the commission of the murder. Because these findings required the jury to determine Dewberry's intent, the omission in the aiding

and abetting instruction does not require reversal.

Unfortunately, the same cannot be said as to appellants Lovett and Denton. Because the jury was not required to resolve the question of their intent under other properly given instructions, we cannot say that the instructional error was harmless. Accordingly, their convictions must be reversed. We proceed to reach the remaining issues in this appeal only insofar as they pertain to appellant Dewberry.

II

Dewberry asserts that, because he was precluded from presenting an affirmative defense at the preliminary hearing, he was denied a substantial right and that his conviction must therefore be reversed.

The preliminary hearing was held in the latter part of January and early February 1981. Later, on April 7, 1981, appellants were given the district attorney's investigator's log

which indicated that Dewberry's statement containing the names of other possible witnesses had been tape recorded. On April 13, 1981, Dewberry filed a motion to dismiss for failure of discovery. The prosecutor claimed the defendants already had a copy of Dewberry's taped statement and that no notes of interviews with the possible witnesses existed. There may, however, have been notes of an interview with one witness. The prosecutor represented that all discoverable materials had been produced at the time of the hearing on the motion to dismiss. Although the court thought "some kind of sanction should be imposed," it denied the motion to dismiss. It did continue the trial for one week.

The denial of an opportunity to investigate the witnesses and to present an affirmative defense at the preliminary hearing is a denial of substantial right. (Wizar v. Superior Court (1981) 124 Cal.App.3d 190, 196.)

A conviction will only be reversed, however, where "defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (People v. Pompa-Ortiz (1980) 27 Cal.3d 519, 529.)

The only prejudice Dewberry claims to have suffered is the denial of his "right to present a defense to a neutral magistrate who, upon the evidence, may have determined not to hold the appellant to answer." In other words, he is only claiming prejudice at the preliminary hearing not at trial. Accordingly because the error at the preliminary hearing did not deny Dewberry of a fair trial, reversal is not compelled. (Ibid.)

III

Dewberry's pretrial motion to discover any existing computer information on prospective jurors was denied. Dewberry asserts a due process right to this information under the California and Federal Constitutions citing

People v. Williams (1981) 29 Cal.3d 392. Williams held that counsel had the right to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges. (Id., at p. 407.) Williams does not stand for the proposition that defendants have a constitutional right to any and all available information on prospective jurors. The court properly denied Dewberry's request.

IV

Dewberry asserts that the prosecutor improperly impeached Lovett by questioning Lovett's post-arrest silence. The United States Supreme Court in Doyle v. Ohio (1976) 426 U.S. 610, 619 held "the use for impeachment purposes of petitioners' silence, at the time of arrest and receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." As stated by the high court: "After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs

when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be an exercise of that right." (Id., at p. 619, fn. 10.)

Lovett's post-arrest silence was questioned as follows:[5]

"Q. You said you surrendered yourself because you didn't want Ronnie to stay in jail for something that you did?

"A. Yeah.

"Q. Well, did you go and start telling people your version of what happened on December 8th when you surrendered yourself?

"A. No, I didn't. [Lovett's objection overruled.]

". . . . . .

"Q. When you surrendered yourself, what,

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5. Dewberry also objects to questions directed at Lovett's prearrest silence. The Fifth Amendment, as applied to the states through the Fourteenth Amendment, is not violated by the use of prearrest silence to impeach a defendant's credibility. (Jenkins v. Anderson (1980) 447 U.S. 231, 238; see People v. Redmond (1981) 29 Cal.3d 904, 910.)

if anything, did you do in order to explain to anybody that Ronnie Dewberry was not involved in the murder of Maurice Williams?

"A. I got up here. [Indicating.]

"Q. So you waited until this whole trial after all the witnesses for the prosecution had testified, before you took the stand to say what happened on December the 8th, 1980?

"A. Well, I didn't feel if I told you, you would try to help me or anything like that.

". . . . . .

"Q. And you didn't think the prosecution would believe you because you knew the prosecution had too much other evidence, didn't you?

"A. No, I didn't. [Lovett's objection sustained.]"

At the next recess Dewberry moved for a mistrial "on the grounds of Doyle v. Ohio." The court denied the motion, noting that all

objections had been preserved.

In Fletcher v. Weir (1982) 455 U.S. 603, 605, the court held that the record must indicate that the defendant received a Miranda warning before he can assert a Doyle error. Respondent asserts that no Miranda warning is shown in the record and that Dewberry therefore cannot claim Doyle error. Dewberry argues that the case should either be remanded to determine if Lovett received a Miranda warning or alternatively should be decided on California law which he contends does not require such a showing. None of these arguments need be addressed, however, if it is concluded that there was no Doyle error or that any existing error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 21-24.) It will therefore first be determined, assuming both that Lovett received a Miranda warning, and that Dewberry has standing to raise this issue whether there was Doyle error, and if so, whether such error

was prejudicial.

It is not always Doyle error for the prosecution to question a defendant's post-arrest silence. The prosecutor may properly reveal that a defendant's trial testimony is completely incongruous with his earlier silence. (People v. Redmond, supra, 29 Cal.3d at pp. 910-911.) Respondent claims that Lovett's testimony that he surrendered himself to exonerate Dewberry cannot be reconciled with his post-arrest silence. We disagree. A person in Lovett's circumstances, i.e., surrendering to the police, would probably be advised by counsel to exercise his Fifth Amendment right to silence and wait until trial to present his version of the facts. Lovett's post-arrest silence may have been an invocation of his constitutional right to remain silent and it was Doyle error for the prosecutor to question him concerning that silence.

This error does not, however, require a

reversal of Dewberry's conviction because it was "harmless beyond a reasonable doubt." (Chapman v. California, supra, 386 U.S. at p. 24.) Lovett's testimony that Dewberry was not present at the time of the shooting corroborated McIntyre's testimony that Dewberry was at the liquor store moments after the shooting. The questions directed at Lovett's failure to immediately upon surrender tell the police of Dewberry's innocence were not of such a nature as to have caused the jury to reject McIntyre's and Lovett's alibi for Dewberry. The jury simply gave greater credence to the many witnesses who saw Dewberry armed with a rifle before the shooting, to Chris' testimony that heard Dewberry say "I got something" right after Maurice was shot, and to the eyewitness who saw Dewberry running from the apartment right after the shooting.

V

Dewberry gave a statement to the police which inculpated his co-defendants. The court

in denying a severence motion brought by Lovett and Denton ordered that "[a]bsolutely no reference whatsoever at any time in the case to that statement given to the police -- categorically right across the board" be made by the prosecutor. During Lovett's testimony the prosecutor posed several questions which suggested to the jurors that the prosecutor knew that Dewberry had a different version of the events. The prosecutor may not use questions as a means of getting otherwise inadmissible evidence before the jury. (People v. Wagner (1975) 13 Cal.3d 612, 619.)

The effect of the improper questions, to which no answers were given may have been cured by the CALJIC No. 1.02[6] instruction

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6. CALJIC No. 1.02 provides in part: "As to any question to which an objection was sustained, you must not guess what the answer might have been or as to the reason for the objection. [§] You must never assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it applies meaning to the answer."

given to the jury. (People v. Szeto (1981) 29 Cal.3d 20, 34 but see People v. Wagner, supra, 13 Cal.3d at p. 621; People v. Aranda (1965) 63 Cal.2d 518, 526.) We need not, however, decide whether the error was cured by this instruction, because the error was in any event harmless.

Although this case involved a credibility battle between the defense and the prosecution witnesses, it is highly unlikely that the jury based its conviction on the references made to Dewberry's version of the shooting. There was other, more compelling evidence upon which they could base their conviction. Because it is not reasonably probable that a result more favorable to Dewberry would have been reached had the questions not been asked, the error was harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

Dewberry also contends that prosecutorial comments made during closing argument prejudiced the jury. Dewberry did not join in Lovett's

objections to the prosecutor's closing argument and may not raise this issue for the first time on appeal. (People v. Green (1980) 27 Cal.3d 1, 34.)

VI

Dewberry asserts that there was insufficient evidence to support his conviction for deliberate and premeditated first degree murder. This court must therefore "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (People v. Johnson (1980) 26 Cal.3d 557, 562.)

The prosecution must, to support a conviction for premeditated murder, present sufficient evidence of planning activity, of motive, and of preconceived design to show that the "killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere

unconsidered or rash impulse hastily executed' . . . ." (People v. Anderson (1968) 70 Cal.2d 15, 26-27.)

After accusing the Williams family of stealing her money, an irate Denton left "to go get [Lovett]." She and Lovett soon thereafter went and got a rifle. They returned with Dewberry to the Williams' home. Dewberry went to the apartment and told everyone to leave because he was going to shoot up the house. Lovett stood outside the apartment building waving a pistol and shouted that he was "going to kill me a mother fucker tonight." After being chased away by Maurice, Lovett yelled "I'm going to get him." The three defendants then quietly climbed the stairs to the apartment. Denton knocked and told Maurice "I'm alone. I want my kids." Maurice opened the door and pulled Denton inside. A rifle barrel was stuck through the door, it was pulled back and a shot or shots rang out. Lovett was heard to say "I got me somebody

and I got five more. We going to empty them all before the night is over with." A neighbor saw Dewberry, Lovett and a woman run from the apartment right after the shot was heard. They jumped into a waiting car and left the area.

This is ample evidence from which the jury could reasonably infer that Denton instigated the affair by going to get Lovett and a rifle to resolve her problems with the Williams. The threats made by Dewberry and Lovett combined with Denton's ruse of pretending to be alone at the door are sufficient evidence of motivation and planning to support a verdict for premeditated and deliberate murder. Dewberry's contention is without merit.

VII

Dewberry also asserts that there was insufficient evidence to support a conviction by lying in wait. The facts of this case support the following v sion of the shooting:

Maurice and other members of Williams' family had been threatened by all three appellants. Maurice knew that Dewberry and Lovett were in the neighborhood armed with a rifle and a handgun. There was a knock on the door. No family member or neighbor heard the usual vibration of the staircase that would be expected if three people had come up the stairs. Denton, intending to deceive Maurice into opening the door so that her cohorts could shoot him, stated that she was alone. From the balcony, which they had reached by stealth and where they were hidden when Denton knocked on the door, Dewberry and Lovett shot at Maurice. One shot went through the door tearing Maurice's neck apart, another, smaller caliber bullet, tore into the fingers of his hands.

"'The gist of "lying in wait" is that the person places himself in a position where he is waiting and watching and concealed from the person killed with the intention of

inflicting bodily injury upon such person or of killing such person.'" (People v. Thomas (1953) 41 Cal.2d 470, 473.) By concealing the presence of Dewberry and Lovett appellants were able to take their victim by surprise. There was ample evidence to support a conviction for murder by lying in wait.

VIII

Dewberry contends that the instructions given allowed the jury to find them guilty of first degree murder without a finding of specific intent to kill. He further asserts that this was reversible error under People v. Johnson (1981) 30 Cal.3d 444.

The jury in this case was given the same instruction given in Johnson.[7] The court

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7. CALJIC No. 8.11 provides in part: "'Malice' may be either express or implied. [§] [Malice is express when there is manifested an intent unlawfully to kill a human being.] [§] [Malice is implied [when the killing results from an act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with a wanton disregard for human

in Johnson held that it was error to give this instruction in a case of assault with intent to commit murder. "'Implied malice, as defined in CALJIC 8.11, cannot coexist with a specific intent to kill.'" (People v. Johnson, supra, at p. 448.) This categorical holding must be viewed in light of the holding in People v. Collie (1981) 30 Cal.3d 43. The same instruction was given in that case, but the court found any instructional error harmless on a charge of attempted first degree murder, "because the jury was properly instructed that the verdict required findings of premeditation and deliberation, which entail a specific intent to kill." (Id., at p. 62.)

The jury in this case was instructed that it could convict appellants of first degree murder if it found sufficient evidence

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life by which is meant an awareness of a duty imposed by law not to commit such acts followed by the commission of the forbidden act despite that awareness] . . . .]" (Emphasis added.)

of premeditation and deliberation. This instruction requires the jury to find express malice.[8]

It was also properly instructed that it could return a conviction of first degree murder under the theory of lying in wait. Murder by lying in wait does not require a finding of a specific intent to kill. (People v. Mason (1960) 54 Cal.2d 164, 168.) The instructions given in this case did not erroneously permit the jury to convict Dewberry of first degree murder without a finding of a specific intent to kill.

IX

Dewberry challenges the rule that a first degree murder conviction may be based on a lying-in-wait theory even where the murder is not shown to be willful, deliberate,

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8. CALJIC No. 8.20 provides in part: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree."

and premeditated. (People v. Merkouris (1956) 46 Cal.2d 540, 560.) This court is, as appellant concedes, bound by that ruling. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) The trial court did not err in following the applicable law.

X

During deliberations the jury asked the court whether the intent to kill must come before the lying in wait in order to establish murder in the first degree. The court answered: "No. In addition to the questions I have answered for you, I also want to remind you that all instructions are to be considered as a whole." (Emphasis in original.)

Dewberry contends that the court's response was erroneous because it failed "to clarify for the jury that the mens rea of lying in wait must precede the termination of

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the act of lying in wait." When CALJIC 8.25[9] is given, the jury is instructed on what type of conduct constitutes lying in wait. The jury is then told that, when this conduct is combined with an intentional infliction of great bodily injury which results in death, murder by lying in wait may be found. "[A]lthough a specific intent to kill is not required to commit murder by lying in wait, 'it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause his death.'" (People v. Mason, supra, 54 Cal.2d at p. 168.) There need be no finding of intent to kill. Thus, the court's response to the question posed was correct.

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9. CALJIC No. 8.25 provides: "Murder which is immediately preceded by lying in wait is murder of the first degree. [¶] The term 'lying in wait' is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise. The lying in wait need not continue for any particular period of time provided

Dewberry's fear that the jury could have found him guilty if "Mr. Lovett, either alone or with Mr. Dewberry, simply waited outside the apartment, harbored neither premeditation nor deliberation or their equivalents, and then fired a shot into the apartment" is unreasonable.

It is clear from the instruction that aimlessly "waiting outside" would not meet the requirements of lying in wait unless it were of a "duration . . . such as to show a state of mind equivalent to premeditation or deliberation." (CALJIC 8.25.) There was no need for the court to clarify for the jury "the mens rea of lying in wait."

The judgment is reversed as to

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that its duration is such as to show a state of mind equivalent to premeditation or deliberation. [¶] To constitute murder by means of lying in wait there must be, in addition to the aforesaid conduct by the defendant, an intentional infliction upon the person killed of bodily harm involving a high degree of probability that it will result in death and which shows a wanton disregard for human life."

appellants Denton and Lovett and affirmed as to Dewberry.

Poche, Acting P.J.

I CONCUR:

Travis, J.*

People v. Dewberry et al.
A011581

*Under assignment by the Chairperson of the Judicial Council.

AMENDMENT 5 OF THE UNITED STATES CONSTITUTION

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

AMENDMENT 14 OF THE UNITED STATES CONSTITUTION

CITIZENSHIP

AMENDMENT XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice

of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United

States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United Stated, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SECTION 1. Citizens of United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

ARTICLE 1, §7 OF THE CALIFORNIA CONSTITUTION

DECLARATION OF RIGHTS

Due process and equal protection; pupil school assignment or transportation; privileges and immunities

Sec. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted would be permitted under federal decisional

law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at this 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may

hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing

the waste of scarce fuel resources, and protecting the environment.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

(Added Nov. 4, 1974. Amended Nov. 6, 1979.)

ARTICLE III, § 1 OF THE CALIFORNIA CONSTITUTION

§ 1. Constitution of United States supreme law of land

Sec. 1. The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

(Added Nov. 7, 1972.)

PROOF OF SERVICE

I am a citizen of the United States and an employed in the City and County of San Francisco, State of California; I am over the age of eighteen years and not a party to the within action; my business address us 722 Montgomery Street, San Francisco, California 94111.

On March 28, 1985, I served the within document:

PETITION FOR WRIT OF CERTIORARI

on the interested parties in said action, by placing the document in an envelope, postage prepaid in full, depositing it in the U.S. mail addressed as follows:

Attorney General Charles Kirk
350 McAllister Street, Suite 6000
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of March, 1985, at San Francisco, California.

Carol Shaw

CAROL S. SHAW, ESQ.